

Iowa Department of Natural Resources Environmental Protection Commission

ITEM

13

DECISION

TOPIC

Inter-governmental Agreement (28E) between the Iowa Department of Natural Resources and the Iowa Comprehensive Petroleum Underground Storage Tank Fund Board to Provide Funding for Assessment and Corrective Action at LUST Sites where a No Further Action Certificate has been Issued.

ATTACHMENT: 28E AGREEMENT for Funding the Reopening of LUST Sites for which NFA Certificates have been issued.

Commission approval is requested for the Department of Natural Resources (DNR) to enter into an agreement with the Iowa Comprehensive Petroleum Underground Storage Tank Fund Board (UST Fund), whereby the UST Fund finances assessment and corrective action of newly identified public health and safety risks associated with historical LUST sites that have been previously 'closed'.

Background:

Iowa Code section 455G.9 specifies conditions on uses for the state's UST remedial benefits account. The authority to enter into this agreement is provided under 455G.9(1)(k) (2007) which states "Pursuant to an agreement between the board and the department of natural resources, assessment and corrective action arising out of releases at sites for which a no further action certificate has been issued pursuant to section 455B.474, when the department determines that an unreasonable risk to public health and safety may still exist. At a minimum, the agreement shall address eligible costs, contracting for services, and conditions under which sites may be reevaluated." The DNR and UST Fund have negotiated terms and conditions regarding eligible sites, scope of work, financing, and termination criteria as indicated in the attached agreement.

The impetus behind the statute change in 2007 was to provide a means to fund necessary assessment and corrective actions to alleviate newly discovered public health and safety risks that are tied to 'old' petroleum releases – specifically, LUST sites which had already been assessed, closed and issued a No Further Action certification. In part, the statute change was made with the intension of strengthening the finality of an NFA certificate for LUST site responsible parties. It was supported by the petroleum marketing industry because the belief was this agreement would take management and funding obligations for these new risk situations out of the hands of the LUST site responsible parties (RP), that it would decrease their liability for old releases (which had been properly assessed and closed per regulations in place at the time), and improve value and marketability of their properties. DNR also supported the statute change because it creates an expeditious means for funding corrective action for documented public health risks (i.e., emergency conditions) regardless of the financial capability /status of the LUST site RP, as well as provides a mechanism for addressing and preventing new potential risks

arising out of newly discovered conditions (for example, finding a new ‘pocket’ of contamination or identifying a previously unreported receptor (well, basement)).

The Process:

The DNR has developed guidelines for how to determine when reopening a closed LUST is warranted. Upon examination of the newly discovered conditions, readily available site information, characteristics of the former plume and investigation, DNR staff will make a determination of whether an unreasonable risk is present or likely to be present such that funding is needed for further assessment and/or corrective action. The DNR and UST Fund will jointly work with groundwater professional to address the risk conditions.

Sections V of the agreement identifies which ‘closed’ LUST site are eligible for assessment and corrective action funding; not all sites will be eligible for funding (e.g., new releases occurring after the NFA certificate was issued). Further, the DNR can make a case to the UST Fund Board and request approval for those sites that fall outside of the eligibility criteria. Should the DNR determine an unreasonable risk is present, but the UST Fund Board determines the site does not qualify for funding, DNR has authority to require the LUST RP to conduct the necessary work [455B.474(1)(h)(3)]. Section VI specifies the funding limitations and eligible and ineligible assessment and corrective action costs.

Wayne Gieselman
Administrator
Environmental Services Division

November 10, 2008

**28E AGREEMENT
BETWEEN THE IOWA COMPREHENSIVE PETROLEUM UNDERGROUND
STORAGE TANK FUND BOARD, AND THE IOWA DEPARTMENT OF NATURAL
RESOURCES FOR ASSESSMENT AND CORRECTIVE ACTION AT LUST SITES FOR
WHICH A “NO FURTHER ACTION” CERTIFICATE HAS BEEN ISSUED**

This Agreement is entered into by and between the Iowa Comprehensive Petroleum Underground Storage Tank Fund Board (hereinafter “Board”), with its Administrator’s office located at 2700 Westown Parkway, Suite 320, W. Des Moines, Iowa 50266, and the Iowa Department of Natural Resources (hereinafter “DNR”), located at 502 E. 9th Street, Des Moines, IA 50319. This Agreement is entered into pursuant to Chapter 28E of the Code of Iowa and Iowa Code sections 455G.5 and 455G.6(15), and is effective as of the date it is fully executed by all parties.

I. PURPOSE

The purpose of this Agreement is to implement the provisions of Iowa Code section 455G.9(1)(k) (2007). The Parties hereby establish the terms under which the Board will provide for assessment and corrective action arising out of releases at leaking underground storage tank sites (“LUST sites”) for which the DNR determines that an unreasonable risk to public health and safety may still exist subsequent to issuing a “no further action” (“NFA”) certificate pursuant to Iowa Code section 455B.474. The Parties do not intend to create a separate legal entity under this Agreement.

II. TERM

This Agreement shall be in effect for an indefinite period of time unless terminated in accordance with this Agreement.

III. ADMINISTRATION

This Agreement shall be jointly administered by the Board and its Administrator and the Director of the DNR or the Director’s designee. All administrative decisions concerning this Agreement shall be undertaken pursuant to the terms outlined herein.

IV. ACQUIRING AND HOLDING OF PROPERTY UNDER THIS AGREEMENT

All real and personal property used or acquired under the terms of this Agreement shall be held in the name of the Board.

V. ELIGIBLE LUST SITES

For a UST Site to be eligible for assessment and corrective action under this Agreement, the DNR must deliver to the Board a written finding that an unreasonable risk to public health and safety may exist at the site. The written finding shall document: (1) evidence the release for which the NFA certificate was issued is a likely source of the unreasonable risk, (2) any release occurring after the release for which the NFA certificate was issued that may contribute to the unreasonable risk, (3) the location of the petroleum UST that is the source of the release, and (4) document the nature and scope of the unreasonable risk.

Notwithstanding a written finding that an unreasonable risk to public health and safety may exist at a Site, Sites may not be eligible for assessment and corrective action under this Agreement when the:

1. Board or its Administrator determines that the DNR had actual knowledge, or should have known, the NFA certificate was issued without substantial compliance with agency rules unless issuance of the NFA certificate was reviewed and approved by the Administrator or a qualified representative;
2. NFA certificate was issued with disregard for factual, technical, procedural or other material errors or omissions that were known or should have been known at the time of issuance by the party to which the certificate was issued;
3. unreasonable risk at the site is solely due to a change in regulations by the Environmental Protection Commission;
4. unreasonable risk at the site is solely due to an impact of a chemical that was not identified as a "chemical of concern" at the time the NFA certificate was issued;
5. Board or its Administrator determine unreasonable risk at the site is solely due to non-compliance with the terms of an institutional control for which the DNR relied upon to approve the no action required classification and issuance of the NFA certificate such as a local ordinance, environmental covenant, or other technological control, or the permitting of a receptor creating an unreasonable risk, unless the terms of the institutional control cannot reasonably be enforced, the condition causing the unreasonable risk was produced by lawful actions, or a third party assumes responsibility to correct the condition causing the unreasonable risk; or
6. unreasonable risk at the site is caused exclusively by a release occurring after the release for which the NFA certificate was issued.

The Board, in consultation with the DNR, may agree on a case-by-case basis to the eligibility of a site for assessment and corrective action not otherwise eligible under the terms of this Agreement.

VI. ELIGIBLE COSTS

When a site is eligible for assessment and corrective action under this Agreement because the DNR determines an unreasonable risk to public health and safety may still exist as provided in paragraph V, the Board agrees to provide for the following assessment and corrective action activities, up to \$100,000 total (unless a greater amount is approved by the Board), and subject to the prioritization rules established by the Board, at eligible sites pursuant to this Agreement:

1. assessment of an actual impact to a receptor to determine the nature and scope of risk to public health and safety;
2. corrective action necessary to reduce or remove contamination actually impacting a receptor, or remove or relocate a receptor, until an unreasonable risk to public health is no longer present;

3. new releases occurring after the release for which the NFA certificate was issued that create an emergency condition (i.e., immediate and imminent threat to public health); otherwise, only after funding from other UST financial responsibility mechanisms are exhausted; and
4. any additional assessment, including assessment for the presence of risk, and corrective action activities the Board, in consultation with the DNR, may agree to provide for on a case-by-case basis.

In reviewing eligibility for assessment and corrective action funding under this paragraph, the parties acknowledge that the DNR's guidance, as amended with the written consent of the parties, will serve as non-binding guidance in evaluating what assessment and corrective action may be warranted and funded under this agreement.

Any assessment and corrective action activities under this Agreement exceeding \$100,000 shall be subject to review and approval by the Board. Any costs, however, associated with the use of State employees, equipment, and materials are not eligible for reimbursement pursuant to this Agreement.

Unless emergency conditions exist, assessment and corrective actions performed pursuant to this Agreement shall have the budget for the work approved by the Board administrator prior to commencement of the work. No expense incurred which is above the budgeted amount shall be paid unless the Board administrator approves such expense prior to its being incurred. All invoices or bills shall be submitted with appropriate documentation as deemed necessary by the Board, no later than thirty days after the work has been performed. The Board is not responsible for payment for work incurred which has not been previously approved by the Board.

VII. RESPONSIBILITIES

The DNR and the Board shall retain all powers and duties conferred by their respective enabling acts, but shall assist each other in the exercise of these powers and the performance of these duties in the following manner:

A. DNR RESPONSIBILITIES

1. Ensure that access to the site for assessment and corrective action activities is granted by the owner of an eligible site.
2. Approve assessment and corrective action activities necessary and proper to confirm, reduce or eliminate the identified unreasonable risk to public health.
3. Maintain records that identify (1) all LUST sites considered "eligible sites" under this Agreement, and (2) all LUST sites for which assessment or corrective action activities are provided for under this Agreement.
4. Obtain input from the Board as needed to fulfill the provisions of this Agreement.

5. Cooperate and assist with Board cost recovery efforts.
6. Assist and cooperate with the Board in developing any professional services contracting documents necessary to implement the terms of this Agreement.

B. BOARD RESPONSIBILITIES

1. Contract with qualified groundwater professionals to perform services required pursuant to this Agreement.
2. Provide funds used exclusively to compensate contractors retained pursuant to this Agreement, and to pay for all other eligible costs incurred to fulfill the provisions of this Agreement.
3. Maintain itemized records of funds expended pursuant to this Agreement for each eligible site that allow the Parties to determine the actual cost of assessment and corrective action activities.
4. Provide input to the DNR as needed to fulfill the provisions of this Agreement.

VIII. FINANCING

The Board shall pay all costs associated with the administration of this Agreement in accordance with the terms of this Agreement.

IX. AMENDMENT

This Agreement may be amended from time to time by written agreement of the Parties. The Parties agree to meet at least every two (2) years from the effective date of this Agreement to review its terms and discuss potential amendments. All amendments shall be in writing, signed by both Parties, and filed with the Secretary of State and recorded with the Polk County Recorder.

X. TERMINATION

A. Termination Upon Mutual Consent. This Agreement may be terminated upon the mutual written consent of the parties.

B. Termination By One Party. Notwithstanding anything in this Agreement to the contrary, and subject to the limitations, conditions, and procedures set forth below, either party to this Agreement shall have the right to terminate this Agreement without penalty by giving sixty (60) days' written notice to the other party to the Agreement as a result of any of the following:

1. There are insufficient funds available to allow a party to fulfill its obligations under this Agreement;

2. A change in the law prevents or substantially impairs a party's ability to participate in this Agreement; or
3. Failure to perform responsibilities described in this Section VII of this Agreement at a quality or quantity that can be reasonably expected by the other party.

XI. NOTICES

Whenever notices and correspondence are to be given under this Agreement, the notices shall be given by personal delivery to the other party, or sent by mail, postage prepaid, to the other party as follows:

To the Board

Iowa UST Fund Board
2700 Westown Parkway, Suite 320
W. Des Moines, Iowa 50266

To the DNR

Iowa Department of Natural Resources
UST Section
502 E. 9th Street
Des Moines, IA 50319

XII. APPLICABLE LAW

This Agreement is to be governed by the laws of the State of Iowa.

XIII. FILING AND RECORDING

It is agreed the Board will electronically file this Agreement with the Secretary of State, and electronically file any amendment, modification, or notice of termination of this Agreement within thirty days as provided in Iowa Code section 28E.8, as amended by 2007 Iowa Acts.

XIV. NO THIRD PARTY BENEFICIARY RIGHTS

The rights and responsibilities of this Agreement are limited solely to parties herein, and this Agreement is not intended to convey a benefit, right, or entitlement of any kind to a party who is not a party to this Agreement. Any benefit to a third party resulting from or related to this Agreement is merely incidental and creates no legal right in a third party to enforce any provision of this Agreement against a party hereto.

XV. LIMITED SCOPE OF AGREEMENT

Except as specifically addressed in this Agreement, the Agreement shall not affect the rights and responsibilities of the Board and the DNR contained in the Iowa Code and the Iowa Administrative Code.

IN WITNESS WHEREOF, and in consideration of the mutual covenants set forth herein and for other good and valuable consideration, the receipt, adequacy, and legal sufficiency of which are hereby acknowledged, the parties have entered into this 28E Agreement and have caused their duly authorized representatives to execute this 28E Agreement.

**IOWA COMPREHENSIVE PETROLEUM
UNDERGROUND STORAGE TANK
FUND BOARD**

**IOWA DEPARTMENT OF NATURAL
RESOURCES**

BY: _____
Susan Voss, Chair

BY: _____
Richard Leopold, Director

DATE: _____

DATE: _____